Supreme Court, U.S.
FILED
AUG 27 2009
OFFICE OF THE CLERK

No. 09-17

IN THE
# Supreme Court of the United States

MARK L. SILVERMAN, *et al.*,

*Petitioners,*

*v.*

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION

ROSS O. SILVERMAN
*Counsel of Record*
CHARLES CHEJFEC
KATTEN MUCHIN ROSENMAN LLP
525 W. Monroe Street
Chicago, IL 60661
312-902-5200

*Attorneys for Respondent*

224833

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTION PRESENTED

Whether this Court should grant certiorari where Petitioners' sole arguments are that the District Court erred by: (1) denying Petitioners' motion for summary judgment premised on a purported lack of damages, although the jury subsequently returned a $4.2 million verdict for State Farm, which was affirmed by the Sixth Circuit; (2) sustaining State Farm's objection to the admission of a state court transcript reflecting the terms of a confidential settlement agreement from an unrelated case; and (3) not giving a jury instruction on conspiracy, although no such claim was asserted against Petitioners, nor were Petitioners held liable under any such theory.

## STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29(6), Respondent State Farm Mutual Automobile Insurance Company ("State Farm") states as follows:

State Farm does not have any parent corporations and no publicly held corporation owns 10% or more of the State Farm's stock.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| STATEMENT PURSUANT TO RULE 29.6 | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF CITED AUTHORITIES | viii |
| INTRODUCTION | 1 |
| STATEMENT OF THE CASE | |
| The Scheme to Defraud | 3 |
| The Scheme Is Uncovered | 6 |
| The Lawsuit and Counterclaims | 7 |
| The Trial; Destruction of Evidence | 8 |
| The Verdicts | 11 |
| REASONS FOR DENYING THE PETITION | 12 |
| I. THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT IS NOT REVIEWABLE AFTER A JURY VERDICT; THE DISTRICT COURT CORRECTLY DENIED SUMMARY | |

*Contents*

*Page*

JUDGMENT; AND, THIS ASSERTED POINT OF ERROR IS NOT A BASIS FOR THIS COURT TO GRANT CERTIORARI. ..... 12

II. THE DISTRICT COURT CORRECTLY EXCLUDED A SETTLEMENT HEARING TRANSCRIPT FROM AN UNRELATED CASE; EVEN IF ERRONEOUS, THE FAILURE TO ADMIT THIS EVIDENCE IS NOT A BASIS FOR THIS COURT TO GRANT THE WRIT. ..... 15

III. THE DISTRICT COURT CORRECTLY REJECTED A CONSPIRACY INSTRUCTION BECAUSE CONSPIRACY WAS NOT PLED; THIS ALLEGED ERROR WAS WAIVED IN THE COURT BELOW; THE COURT OF APPEALS DID NOT AFFIRM THE FRAUD COUNTS ON GROUNDS OTHER THAN THOSE PLED; AND EVEN IF IT WAS NOT WAIVED, OR IF THE DECISION WAS ERRONEOUS, THE ERROR PETITIONERS NOW ALLEGE IS NOT A BASIS FOR THIS COURT TO GRANT CERTIORARI. ..... 20

*Contents*

*Page*

IV. THE PETITIONERS' NUMEROUS MISSTATEMENTS OF FACT AND LAW CONSTITUTE AN ADDITIONAL REASON TO DENY CERTIORARI .... 25

A. Misstatements About Judge Friedman and The Conduct of The Trial ..... 26

1. "Petitioners did not receive a fair trial from the district judge that Respondent State Farm . . . selected for this case." Chief Judge Friedman "rewarded State Farm's confidence in him by systematically ruling in State Farm's favor on every substantive legal issue before him, facilely changing his reasoning and factual findings to suit whatever State Farm needed at the moment." ..... 26

2. "After refusing to give Mr. Silverman the time to read the entire proposed pleading, let alone file any response to the motion, the district court granted the motion to amend. Although he could not wait until Mr. Silverman had read the proposed pleading, he had time to heap praise on State Farm's counsel." ..... 28

*Contents*

*Page*

3. "Judge Friedman is a friend of a founding partner of State Farm's local counsel. This particular attorney had developed animosity toward Mr. Silverman when Mr. Silverman represented a client that sued a member of a prominent political family, who was represented by this attorney." ... 30

B. Misstatements Related To The Evidence Admitted Or Excluded At Trial. ..... 31

1. "The evidence at trial was almost exclusively devoted to how [Swagler] did not comply with [State Farm's] policies." ..... 31

2. "The district court judge refused to admit the public record [transcript] into evidence because Respondent and a non-party to this case had agreed to call the public record 'confidential.'" .... 33

C. Misstatements About The Basis Upon Which The Court of Appeals Affirmed The Fraud Verdicts. ..... 34

*Contents*

*Page*

1. "The court of appeals affirmed the judgment based upon two new legal theories that were never raised in the district court. One of these new theories was raised by State Farm for the first time at oral argument. The second was not even raised by State Farm. Instead, the circuit court itself raised the theory in its opinion affirming the judgment." ..... 34

CONCLUSION AND RELIEF REQUESTED ..... 35

## TABLE OF CITED AUTHORITIES

*Page*

**Cases**

*Black v. J.I. Case Co., Inc.*,
22 F.3d 568 (5th Cir. 1994) ..... 13

*Cooley v. Carmike Cinemas, Inc.*,
25 F.3d 1325 (6th Cir. 1994) ..... 19

*Geisler v. Folsom*,
735 F.2d 991 (6th Cir. 1984) ..... 19

*Glaros v. H.H. Robertson Co.*,
797 F.2d 1564 (Fed. Cir. 1986) ..... 13

*Gumberg v. Treusch*,
61 N.W. 872 (Mich. 1895) ..... 24

*Hamling v. United States*,
418 U.S. 87 (1974) ..... 19

*Jarrett v. Epperly*,
896 F.2d 1013 (6th Cir. 1990) ..... 13

*Kahn v. Friedman*,
45 N.W.2d 18 (Mich. 1950) ..... 24

*Kefuss v. Whitley*,
189 N.W. 76 (Mich. 1922) ..... 24

*Cited Authorities*

*Page*

*Lama v. Borras*,
16 F.3d 473 (1st Cir. 1994) ..... 13

*Locricchio v. Legal Serv. Corp.*,
833 F.2d 1352 (9th Cir. 1987) ..... 13

*Magnum Import Co. v. Coty*,
262 U.S. 159 (1923) ..... 3

*Martinoff v. Jackson News Pub. Co.*,
197 N.W. 576 (Mich. 1924) ..... 24

*McDonald v. Smith*,
102 N.W. 668 (Mich. 1905) ..... 24

*Metro. Life Ins. Co. v. Golden Triangle*,
121 F.3d 351 (8th Cir. 1997) ..... 13

*Munoz v. Oceanside Resorts, Inc.*,
223 F.3d 1340 (11th Cir. 2000) ..... 13

*Nolan v. Greene*,
383 F.2d 814 (6th Cir. 1967) ..... 20

*Pahuta v. Massey-Ferguson, Inc.*,
170 F.3d 125 (2nd Cir. 1999) ..... 13

*Paschal v. Flagstar Bank*,
295 F.3d 565 (6th Cir. 2002) ..... 13

*Cited Authorities*

*Page*

*Poller v. Columbia Broad. Sys., Inc.*,
368 U.S. 464 (1962) ..... 14

*Rice v. Sioux City Mem'l Park Cemetery, Inc.*,
349 U.S. 70 (1955) ..... 2-3

*Robinson v. Garrett*,
966 F.2d 702 (D.C. Cir. 1992) ..... 13

*Shohadaee v. Metro. Gov't of Nashville & Davidson County*,
150 Fed. Appx. 402 (6th Cir. 2005) ..... 13

*Tompkin v. Philip Morris USA, Inc.*,
362 F.3d 882 (6th Cir. 2004) ..... 19

*United States v. Abel*,
469 U.S. 45 (1984) ..... 19

*United States v. Birnie*,
193 Fed. Appx. 528 (6th Cir. 2006) ..... 20, 21

*United States v. DeSantis*,
134 F.3d 760 (6th Cir. 1998) ..... 21

*United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*,
400 F.3d 428 (6th Cir. 2005) ..... 13

*Varghese v. Honeywell Intern., Inc.*,
424 F.3d 411 (4th Cir. 2005) ..... 13

*Cited Authorities*

*Page*

*Watson v. Amedco Steel, Inc.*,
29 F.3d 274 (7th Cir. 1994) ..... 13

*Whalen v. Unit Rig, Inc.*,
974 F.2d 1248 (10th Cir. 1992) ..... 13

**Statutes**

28 U.S.C. § 1332(a)(1) ..... 7

**Other Authorities**

Sup. Ct. R. 10 ..... 3

Sup. Ct. R. 14(4) ..... 25, 28, 35

Sup. Ct. R. 15(2) ..... 25

Sup. Ct. R. 24(6) ..... 26, 28

Fed. R. Civ. P. 12 ..... 29

Fed. R. Civ. P. 13 ..... 26, 27

Fed. R. Civ. P. 19 ..... 26, 27

Fed. R. Civ. P. 20 ..... 26, 27

Fed. R. Civ. P. 56(c) ..... 14

*Cited Authorities*


| | *Page* |
|---|---|
| Fed R. Evid. 402 | 15 |
| Fed. R. Evid. 403 | 15 |
| E.D. Mich. LR 83.11(a) | 27 |
| E.D. Mich. LR 83.11(a)(1) | 27 |
| Robert L. Stern, Supreme Court Practice 222-25 (8th ed. 2002) | 15 |

## INTRODUCTION

Petitioners' Petition for Writ of Certiorari ("Petition" or "Pet.") should be denied because they fail to present a single "compelling reason" for granting certiorari. Rather, they have presented three purported errors: the denial of summary judgment, the exclusion of a single piece of evidence, and the failure to give a conspiracy instruction. Each of these bases constitutes nothing more than an alleged misapplication of a properly stated rule of law.

First, Petitioners contend that the District Court erred by denying their motion for summary judgment, in which they argued that State Farm could not prove any damages. The jury, however, clearly disagreed with Petitioners when it awarded State Farm $4.2 million. Additionally, the Sixth Circuit, along with every other United States Court of Appeals that has considered the issue, correctly held that Petitioners cannot challenge the denial of summary judgment on appeal after losing after a full trial on the merits. Moreover, six out of eleven counts were for declaratory judgments and did not even involve the question of damages.

Second, Petitioners argue that the District Court erred by excluding a confidential hearing transcript from a completely unrelated state court case. Petitioners make this argument despite the following facts: (1) the transcript involved an unrelated settlement in a state court case that was irrelevant to the claims at trial because the settlement was reached three years after the relevant events in this case, (2) the settlement was confidential, and (3) the inadvertence of the parties and

state court was the sole reason the transcript was mistakenly not sealed.

Finally, Petitioners contend that the District Court erred by refusing to instruct the jury on conspiracy, arguing that they could not be held liable for the misrepresentations and omissions of their co-defendant, Linda Swagler, without such an instruction. However, State Farm did not bring a conspiracy claim against Petitioners, and Petitioners were not found liable under a conspiracy theory. Rather, after being instructed on the relevant claims and theories of liability, the jury expressly found in special interrogatories that each Petitioner was liable for fraud based upon his or its own material misrepresentations and omissions, thus rendering moot the dispute about whether a conspiracy instruction should have been given.

These alleged District Court errors do not present "compelling reasons" for this Court to grant certiorari. Moreover, although Petitioners appear in passing to invoke the Court's "supervisory power" (*see* Pet. at 6), Petitioners do not and cannot explain the manner in which the District Court "so far departed from the accepted and usual course of judicial proceedings" as to render this case worthy of the Court's consideration. Nor do Petitioners point to a circuit split, conflict with a holding of a state's highest court, an important federal question that remains unresolved by the Court, or a conflict with a prior Supreme Court holding.

This Court has repeatedly stated that it will not grant certiorari "for the benefit of the particular litigants." *See Rice v. Sioux City Mem'l Park Cemetery*,

*Inc.*, 349 U.S. 70, 74 (1955); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923); Sup. Ct. R. 10. Rather, this Court will only hear cases for "compelling reasons" that go well beyond the case at hand. *Id.*

Indeed, this case is devoid of any unusual, novel, or significant issue of state or federal law. Petitioners' arguments constitute nothing more than a rehash of issues thoroughly considered, and properly rejected, by Chief Judge Bernard A. Friedman during and after the trial, and then by the Sixth Circuit, first in its detailed opinion affirming the verdict and then in its opinion denying reconsideration. In short, the types of errors alleged in the Petition do not present a sufficient basis to warrant this Court's review. Therefore, Respondent respectfully requests that this Court deny Petitioners' request for a writ of certiorari.

## STATEMENT OF THE CASE

### The Scheme to Defraud

From approximately September 2001 to November 2003, Petitioners engaged in a scheme with State Farm insurance adjuster Linda Swagler ("Swagler") to steal millions of dollars from State Farm through a complex fraud scheme (the "Scheme"). Pursuant to the Scheme, Swagler, a 30 year employee who handled only claims involving catastrophic injuries, secretly steered nine insureds ("Insureds"), whose claims she personally handled, to Petitioner Mark Silverman ("Silverman"), who is a personal injury attorney and psychiatrist. Silverman proceeded to provide psychiatric services to some of the Insureds, and to represent all the Insureds in their injury claims against State Farm.

Acting in concert, Silverman and Swagler manipulated the information and documents in these claim files to conceal from Swagler's State Farm supervisors: (1) that Silverman was representing and treating the Insureds, (2) significant settlements that Swagler entered into with Silverman regarding the Insureds' claims, and (3) information regarding the Insureds' claims that would have undermined the purported bases upon which Swagler's settlements with Silverman were made. Furthermore, Silverman and Swagler created false documents that were designed to induce Swagler's State Farm supervisors to approve large settlements with Silverman. Finally, Silverman and Swagler manufactured and backdated written settlement agreements (the "Fraudulent Settlements") that purported to obligate State Farm to pay millions of dollars to six Insureds in the future. To avoid detection, during discovery Silverman arranged to have the Fraudulent Settlements and related "metadata" deleted from his computer hard drive. Moreover, during the trial and shortly before producing an external hard drive which had been copied from his computer, Silverman arranged to further manipulate the metadata relating to the Fraudulent Settlements. Every aspect of the Scheme was intended to enrich Silverman at State Farm's expense, and often at the expense of Silverman's own clients.

Specifically, Silverman and Swagler worked together to:

- misrepresent the past and current medical conditions of the Insureds;

- misrepresent the past and current care provided to the Insureds;

- misrepresent to State Farm supervisors that Swagler had purportedly received authority to make payments or settle claims from other supervisors or legal counsel;

- conceal Silverman's involvement as the Insureds' attorney or psychiatrist;

- ignore and waive the rule in Michigan that the Insureds' claims needed to be filed within one year from when expenses were incurred;

- make significant payments to Silverman without requesting or receiving supervisory authority;

- manipulate reserves to facilitate increased payments;

- misrepresent to supervisors the amounts Swagler had paid or committed to pay to Silverman and the Insureds;

- manufacture and backdate the Fraudulent Settlements;

- conceal key medical records and other documents from State Farm's claim files which would have disclosed the Scheme; and

- make approximately 1,500 phone calls to each other during the two-year Scheme, many of which were made around key events of the Scheme.

As a result of the Scheme, State Farm paid $4.2 million of benefits that were not owed, and more than $1.7 million of those amounts went to Silverman for his attorney's fees or psychiatry charges.

**The Scheme Is Uncovered**

On November 20, 2004, after discovering irregularities in the Insureds' claim files, State Farm auditors attempted to interview Swagler. During this interview, Swagler denied any improprieties and ended the interview abruptly by walking out and resigning from State Farm effective immediately. Telephone records establish that Swagler and Silverman initiated 12 calls to each other during breaks from the interview, and over the following weekend, they called each other another 11 times and spoke for several hours.

Following Swagler's resignation, State Farm declined to honor the Fraudulent Settlements because it: (1) was unaware of and had never authorized most of them; and (2) had been duped into authorizing the others based upon misinformation from Silverman and Swagler. As discussed next, Silverman then attempted to enforce the Fraudulent Settlements by filing lawsuits against State Farm, alleging that the Fraudulent Settlements were valid and that State Farm was obligated to make payments pursuant to them.

## The Lawsuit and Counterclaims

From approximately March 2004 to June 2004, Silverman filed a series of individual lawsuits on behalf of the Insureds against State Farm to enforce the Fraudulent Settlements. These lawsuits included a Complaint that Silverman filed on May 28, 2004, on behalf of Insured Robert Rivet (the "Rivet claims"). On June 23, 2004, State Farm removed the Rivet claims to federal court, and on July 5, 2005, the District Court granted State Farm leave to file counterclaims (the "Counterclaims") against Swagler and Silverman, his legal PC, and his psychiatric PC (collectively referred to as "Petitioners").

Count One of the Counterclaims alleged common law fraud against Swagler and the Petitioners under Michigan law. Count Two alleged breach of fiduciary duty against Swagler under Michigan law. Count Three alleged aiding and abetting a breach of fiduciary duty against Petitioners under Michigan law. (Counts Four and Five are not relevant to this appeal.) Counts Six through Eleven sought declaratory judgments that the six Fraudulent Settlements had been fraudulently procured and were therefore null and void. Because these Insureds claimed an interest in the Fraudulent Settlements, they and/or their guardians were named as counter-defendants in Counts Six through Eleven under Federal Rule of Civil Procedure 19. State Farm sought monetary damages from only the Petitioners and Swagler, not from the Insureds, who were named solely as interested and necessary parties to the declaratory judgment claims.

The District Court had jurisdiction over each of these counterclaims under 28 U.S.C. § 1332(a)(1).

## The Trial; Destruction of Evidence

From March 5 to April 17, 2007, State Farm tried Counts One through Three of its Counterclaims to the jury. Counts Six through Eleven, the declaratory judgment claims, were tried to the Honorable Bernard A. Friedman, then the Chief Judge of the Eastern District of Michigan.[1]

During trial, State Farm called medical doctors, nurses, case managers, Swagler's supervisors, an in-house lawyer, and, for eight days of testimony, Silverman and Swagler themselves.

Seven doctors (Kerner, Pearlman, Moylan, Pelshaw, Hinderer, Neishoff, and Benjamins) testified that Swagler's log notes regarding what they had purportedly stated about the Insureds' medical conditions and needs were false, either because the conversations Swagler described never happened or because the doctors' actual statements were the opposite of what Swagler wrote in the claim file.

In other instances, the doctors testified that prescriptions described by Silverman in correspondence to State Farm and by Swagler in her claim file log notes had never been written, and that aspects of their reports had been completely misrepresented by Swagler to her supervisors. For example, Dr. Denyce Kerner, a licensed psychologist specializing for 30 years in neuropsychology, testified that she had informed Swagler that Insured

1. Rivet's claim against State Farm was bifurcated and later settled.

John Shures needed to receive only 6 hours per day of "supervision." Swagler, however, informed her State Farm supervisors that Dr. Kerner felt that Shures needed 24-hours-per-day of higher level "attendant care."

State Farm also proved that Silverman and Swagler repeatedly fired the Insureds' health care providers when they refused to provide false prescriptions or reports, or when they would have been in a position to contravene false information that Silverman and Swagler were using to dupe Swagler's supervisors. For example, Silverman and Swagler terminated three highly qualified doctors, Drs. Pelshaw, Hinderer, and Nieshoff, all of whom were deeply committed to the Insureds' care, because they refused to prescribe 24 hours per day of attendant care that was not needed. Similarly, Silverman and Swagler fired medical case managers Sandy Trout from the Shures file; Rita Ingersoll from the Scott file; Health Partners from the Vaughn file; and Rita Ingersoll and Donna Rogers from the Gentris file. These medical case managers were fired because they were in a position to know that the information that Silverman and Swagler were communicating to State Farm supervisors regarding the conditions and needs of the Insureds was false.

As the Scheme unraveled, Silverman created and backdated the Fraudulent Settlements on his computer. The Fraudulent Settlements purported to commit State Farm to pay millions of dollars in benefits that were not actually owed over many years into the future. Most of the Fraudulent Settlements had never been shown to or approved by a supervisor; never appeared in Swagler's log notes contemporaneous to when they

were purportedly entered; were never contemporaneously placed in the imaged-documents claim files; and were for time periods well in excess of State Farm's standard agreements. The Fraudulent Settlements did not contain the required releases from the Insureds, and the agreements wholly favored the Insureds in that benefits could increase if circumstances changed, but they could never decrease.

At trial, State Farm established that the day before a court-appointed computer forensic expert downloaded the hard drive from Silverman's computer, an attempt had been made to delete the Fraudulent Settlements and related "metadata" from the computer. Furthermore, during the trial, Silverman was ordered to produce an external copy of the hard drive of his computer. The evidence established that the metadata on that external drive was manipulated after the trial began and before the drive was produced.

With respect to the withholding of and tampering with this key computer evidence, Judge Friedman specifically held:

> The Court believes that Mr. Silverman was in contempt . . . I think it's unequivocal that he violated a court order by not turning over the external drive in a timely fashion when he had the drive, when it was at his location . . . There's no question about it that that was in contempt of court, it was in direct violation of this court's order . . . I [also] think it was in direct violation of this court's order that he

> manipulated or caused to be manipulated his computer . . . I can't say he did it himself, but he at least caused, he was part of the scheme to do so. And even more acute that he was part of that scheme to do it during this trial when he was supposed to turn that external drive over. . . [H]e directly violated this court's order will fully, wantonly and knowingly.

**The Verdicts**

On April 17, 2007, in less than four hours of deliberation, the jury rendered a unanimous verdict for State Farm on each count, answering each of 27 special interrogatories in favor of State Farm, including interrogatories that Silverman, his Legal PC, and his Psychiatric PC each intentionally made material misrepresentations and omissions that proximately caused State Farm's damages. The jury then awarded State Farm $4.2 million in damages.

On April 19, 2007, Judge Friedman held that the Fraudulent Settlements were null and void because they had been procured by fraud. In fact, Judge Friedman concluded that State Farm had proved fraud by clear and convincing evidence, and further stated that "if this were a criminal case the court would have no hesitation whatsoever" in finding the Petitioners and Swagler guilty "beyond a reasonable doubt." Judge Friedman described several documents and log entries in the claim files that the Petitioners and Swagler had used to effectuate the Scheme as "false and misleading and totally fabricated." He found that the Fraudulent Settlements had been fabricated and "procured as a

result of the wrongful, illegal Scheme between Silverman and Swagler" and that these agreements were never "approved or authorized by State Farm."

Judge Friedman subsequently entered a Final Judgment Order and denied Petitioners' motions for a new trial and for judgment notwithstanding the verdict. Petitioners appealed to the Sixth Circuit. On March 12, 2009, the Sixth Circuit affirmed the jury's verdict and Judge Friedman's verdict in their entirety, rejecting the Petitioners' nine points of error. On April 1, 2009, the Sixth Circuit panel denied Petitioners' request for a rehearing.

## REASONS FOR DENYING THE PETITION

### I. THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT IS NOT REVIEWABLE AFTER A JURY VERDICT; THE DISTRICT COURT CORRECTLY DENIED SUMMARY JUDGMENT; AND, THIS ASSERTED POINT OF ERROR IS NOT A BASIS FOR THIS COURT TO GRANT CERTIORARI.

Petitioners seek a writ of certiorari so that this Court may review the District Court's denial of Petitioners' summary judgment motion on the ground that State Farm did not respond to that motion with sufficient admissible evidence regarding its damages. The District Court rejected this argument, concluding that questions of material fact with respect to damages "abound." The Sixth Circuit declined to review this denial of summary judgment because the law is well-established that a District Court's denial of a summary

judgment motion is not reviewable on appeal where the movant has later lost after a full trial on the merits. *See Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990); *Paschal v. Flagstar Bank*, 295 F.3d 565, 571 (6th Cir. 2002); *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 441 (6th Cir. 2005); *Shohadaee v. Metro. Gov't of Nashville & Davidson County*, 150 Fed. Appx. 402, 403-04 (6th Cir. 2005).

The foregoing cases explain that even assuming an error in the denial of summary judgment, the potential injustice of allowing the improper denial of the motion is outweighed by the actual injustice of depriving a party of a jury verdict after the evidence has been fully presented. *See, e.g., Paschal*, 295 F.3d at 571.[2]

The only exception to this rule – where the denial of summary judgment turns on an issue that is "purely one of law" (*Paschal*, 295 F.3d at 571) – is inapplicable

---

2. Every Circuit Court of Appeals to consider this issue has reached the same conclusion, including the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits. *See Lama v. Borras*, 16 F.3d 473, 477 (1st Cir. 1994); *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 130 (2nd Cir. 1999); *Varghese v. Honeywell Intern., Inc.*, 424 F.3d 411, 421 (4th Cir. 2005); *Black v. J.I. Case Co., Inc.*, 22 F.3d 568, 571 (5th Cir. 1994); *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 277 (7th Cir. 1994); *Metro. Life Ins. Co. v. Golden Triangle*, 121 F.3d 351, 354 (8th Cir. 1997); *Locricchio v. Legal Serv. Corp.*, 833 F.2d 1352, 1358-59 (9th Cir. 1987); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1250 (10th Cir. 1992); *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340, 1344 (11th Cir. 2000); *Robinson v. Garrett*, 966 F.2d 702, 702 (D.C. Cir. 1992); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573-74 (Fed. Cir. 1986).

here, because the sole basis for Judge Friedman's ruling was that "questions of material fact abound." Thus, the Sixth Circuit committed no error in applying this well-established rule to the circumstances of this case.

Petitioners do not ask this Court to review this unanimous rule of law, nor could they since there is no circuit split on the issue. Rather, Petitioners appeal to the fact that there is no express statutory provision or prior decision of this Court to prohibit appellate review of the denial of their summary judgment motion. However, this does not satisfy Petitioners' burden to present a *compelling reason* why the Court should review the Sixth Circuit's decision declining appellate review of the summary judgment denial.

Setting aside the impropriety of reviewing the denial of a motion for summary judgment where the movant subsequently loses at trial, the District Court correctly concluded on summary judgment that Petitioners had not met their burden of establishing that there were *no disputed issues of material fact*. *See* Fed. R. Civ. P. 56(c); *see also Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) ("[T]he purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try."). Indeed, the District Court correctly concluded that genuine issues of material fact existed as to damages, and the jury verdict resolved those issues by awarding State Farm damages of $4.2 million. Thus, the motion for summary judgment was properly denied.

Finally, regardless of whether these motions were properly or improperly denied, this Court has repeatedly

stated that its charge is not to fix the errors of every individual trial, but rather to take cases that present compelling reasons for their consideration, cases involving federalism, executive power, constitutional rights, statutory construction, and the like. *See* Robert L. Stern, Supreme Court Practice 222-25, 249-52 (8th ed. 2002). Such is clearly not the case here.

## II. THE DISTRICT COURT CORRECTLY EXCLUDED A SETTLEMENT HEARING TRANSCRIPT FROM AN UNRELATED CASE; EVEN IF ERRONEOUS, THE FAILURE TO ADMIT THIS EVIDENCE IS NOT A BASIS FOR THIS COURT TO GRANT THE WRIT.

Petitioners also ask this Court to grant certiorari to correct the District Court's alleged error in refusing to admit a single settlement hearing transcript from a case unrelated to the case before the District Court. This transcript was from a state court hearing, during which State Farm and another Silverman client who was not a party to this case, Rachel Apostolopolous, presented on the record a confidential settlement agreement that they had reached three years after Swagler left State Farm (the "Apostolopolous Settlement" and "Apostolopolous Settlement Transcript").

The District Court refused to admit the Apostolopolous Settlement Transcript on two grounds. First, the court excluded the Apostolopolous Settlement Agreement for reasons that fit within the parameters of Federal Rules of Evidence 402 and 403, ruling that it was irrelevant to the issues before the court and jury

because the settlement was not entered and signed until 2006 – several years after the events at issue in the instant case. Second, the court sustained State Farm's objection because the transcript contained the terms of "a confidential settlement agreement" that the parties and their attorneys (including Silverman himself) had agreed to keep confidential, but which had remained unsealed solely through an administrative failure to have the transcript sealed.

Petitioners asserted at trial, in their appeal to the Sixth Circuit, and in their Petition, that the terms of the Apostolopolous Settlement set forth in the transcript would have "rebutted numerous theories" offered by State Farm, by showing that "other State Farm representatives did exactly what it was fraudulent for Ms. Swagler to do," which was to "approve a large settlement agreement between State Farm and one of Silverman's clients." The Sixth Circuit rejected this argument, finding that no abuse of discretion occurred in excluding the transcript, and further holding that even if it were error to exclude the transcript, any such error was harmless because the same theory had been fully presented to the jury using similar evidence, and that argument was ultimately rejected by the jury.

There are at least four reasons this Court should not grant certiorari on this question. First, both the District Court and Sixth Circuit were correct in concluding that the Apostolopolous Settlement Transcript was irrelevant. The District Court correctly held that the December 2006 Apostolopolous Settlement Agreement was not relevant to a Scheme that took place between September 2001 and November 2003. The

Sixth Circuit affirmed, in part, on this very point. Moreover, the circumstances that led to the Apostolopolous Settlement Agreement in 2006 were different than the circumstances which led to the Fraudulent Settlements, such that the terms of the Apostolopolous Settlement Agreement simply did not make the issue of whether Silverman and Swagler engaged in a Scheme to defraud in 2001 to 2003 "more or less likely."[3]

---

3. Petitioners now contend that "State Farm alleged in the counterclaim that the Apostolopolous settlement was part of the scheme to defraud State Farm." (Pet. at 30.) This is false and mischaracterizes State Farm's Counterclaims. Specifically, it would have been impossible for State Farm to allege in its Counterclaims, which were filed in July 2005, that a settlement agreement not reached until December 2006 was part of the Scheme which took place from 2001 to 2003.

State Farm did, however, refer to Rachel Apostolopolous in its July 2005 Counterclaims, alleging that "[a]s part of the Scheme, Swagler improperly referred, directly or indirectly, certain Insureds to Silverman to be their attorney, including but not limited to Rachel Apostolopolous . . . and Michael Dowidait," and that "Swagler also provided Silverman with confidential information about the Apostolopolous and Dowidait files, on which she was the claim representative, prior to Silverman's involvement." (Counterlcaims ¶¶ 215 and 316(b).) Although Apostolopolous later became a client of Silverman, Swagler was confronted with the fraud Scheme and resigned before she and Silverman were able to manipulate the Apostolopolous file. While the Counterclaims indicated that the steering of Rachel Apostolopolous to Silverman as a client and providing him with confidential information about her were both originally part of the Scheme, by the time the Pretrial Order was filed and the trial held, the Apostolopolous file was not part of the case. This Court should reject Petitioners' clearly false statement that State Farm alleged that the Apostolopolous Settlement was part of the scheme to defraud.

Second, the Apostolopolous Settlement Agreement was clearly marked confidential by the parties and their counsel, including Silverman, who represented Apostolopolous in the settlement. Silverman was named as a counter-defendant in July 2005, and therefore, knew when he signed the confidentiality agreement in December 2006 that he would not later be able to use it at his own trial. Indeed, during argument on the admissibility of the transcript, Silverman himself expressly conceded that he was bound by the confidentiality provisions in the Apostolopolous Settlement Agreement.

The sole basis on which he and his counsel attempted to admit the terms of the Apostolopolous Settlement into evidence was the parties' administrative failure to have the court seal the settlement hearing transcript. Judge Friedman was correct when he concluded that the parties' inadvertent failure to seal the transcript in the state court case was not a basis to overturn the parties' intent regarding confidentiality. Specifically, Judge Friedman stated, "We are not here to play games . . . . [A] mistake may have been made that it was not sealed but as an officer of the Court I think you have a duty . . . not to disclose it." The Sixth Circuit agreed.

Third, even if the exclusion was error (which it was not for the reasons stated above), such error was harmless because Petitioners successfully moved the admission of another settlement agreement that had been entered into between a State Farm representative and Silverman in a different, unrelated claim. Petitioners were permitted to argue to the jury that this other settlement agreement proved the same theory that they

sought to make about the Apostolopolous Settlement Agreement. The jury, however, clearly rejected the argument. On appeal, the Sixth Circuit correctly held that, "[Silverman's failure] to explain why a similar settlement agreement that was admitted at trial did not suffice to present this theory to the jury, making any error harmless." (Citing *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1330 (6th Cir. 1994).)

Fourth, this claim of error – that a single piece of evidence was excluded – in a case where the jury and judge, after hearing seven weeks of evidence, overwhelmingly found that the Petitioners engaged in fraud, simply does not present this Court with a "compelling reason" to grant certiorari. This Court has long held that because the trial judge "sits in the arena of litigation," he or she "has, and must have, broad discretion in the conduct of a trial. Rulings on the relevancy and materiality of evidence may not be disturbed on appeal in the absence of a showing of clear abuse of discretion." *Hamling v. United States*, 418 U.S. 87, 126 (1974); *see also Geisler v. Folsom*, 735 F.2d 991, 997 (6th Cir. 1984). Indeed, "[a] district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules. Assessing the probative value of [the proffered evidence], and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403 . . . ." *United States v. Abel*, 469 U.S. 45, 54 (1984); *see also Tompkin v. Philip Morris USA, Inc.*, 362 F.3d 882, 897 (6th Cir. 2004).

For all these reasons, the Court should deny the writ.

## III. THE DISTRICT COURT CORRECTLY REJECTED A CONSPIRACY INSTRUCTION BECAUSE CONSPIRACY WAS NOT PLED; THIS ALLEGED ERROR WAS WAIVED IN THE COURT BELOW; THE COURT OF APPEALS DID NOT AFFIRM THE FRAUD COUNTS ON GROUNDS OTHER THAN THOSE PLED; AND EVEN IF IT WAS NOT WAIVED, OR IF THE DECISION WAS ERRONEOUS, THE ERROR PETITIONERS NOW ALLEGE IS NOT A BASIS FOR THIS COURT TO GRANT CERTIORARI.

Petitioners assert that the jury found them "vicariously liable for what Ms. Swagler had said or done while at State Farm," and then argue that when they raised this issue on appeal, the Sixth Circuit affirmed the verdict "based upon a claim [of conspiracy] that was never submitted to the jury." Pet. at 16, 17. Petitioners conclude that "by affirming the district court judgment on legal theories that was [sic] never pled, litigated, or decided by a jury, the court of appeals violated [Petitioners'] due process rights." Pet. at 19. Petitioners are wrong for several reasons.

"In considering the correctness and adequacy of a charge to the jury, it should be taken as a whole and read in its entirety." *See United States v. Birnie*, 193 F. App'x 528, 537 (6th Cir. 2006) (citing *Nolan v. Greene*, 383 F.2d 814, 816 (6th Cir. 1967)). "'A district court's refusal to deliver a requested instruction is reversible error only if the instruction (1) is a correct statement of

the law, (2) is not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant's defense.'" *Id.* (quoting *United States v. DeSantis*, 134 F.3d 760, 768 (6th Cir. 1998)). Petitioners cannot satisfy these requirements.

To begin, State Farm did not allege a conspiracy claim, nor did the jury find Petitioners liable for conspiracy. State Farm did, however, allege that Petitioners and their co-defendant, Swagler, defrauded State Farm. The District Court gave thorough instructions on State Farm's fraud claim, including an instruction for each of the following: (1) material misrepresentations, (2) material omissions, (3) to explain that fraud can be proven by either material misrepresentations or omissions, (4) to explain materiality, and (5) to explain reliance. Petitioners do not challenge the propriety of the detailed instructions that the District Court actually gave the jury on State Farm's fraud claim.

Moreover, contrary to Petitioners' contention, the jury did not find Petitioners vicariously liable for Swagler's misrepresentations and omissions to State Farm. Rather, during the trial, State Farm proved that Petitioners' *own* intentional misrepresentations and omissions, *taken alone*, were sufficient to establish their liability for common law fraud. Indeed, at Silverman's insistence, the jury was provided with the following special interrogatories, pursuant to which it concluded that each of the Petitioners had personally

made material misrepresentations and omissions by answering "Yes" to each:

| | |
|---|---|
| Question 1. | Do you find, by clear and convincing evidence, that Mark Silverman committed fraud by misrepresentation? |
| Question 3. | Do you find, by clear and convincing evidence, that Mark Silverman, M.D., P.C. committed fraud by misrepresentation? |
| Question 5. | Do you find, by clear and convincing evidence, that Mark Silverman, M.D., J.D., P.C. committed fraud by misrepresentation? |
| Question 9. | Do you find, by clear and convincing evidence, that Mark Silverman committed fraud by failing to disclose material facts? |
| Question 11. | Do you find, by clear and convincing evidence, that Mark Silverman, M.D., P.C. committed fraud by failing to disclose material facts? |
| Question 13. | Do you find, by clear and convincing evidence, that Mark Silverman, M.D., J.D., P.C. committed fraud by failing to disclose material facts? [4] |

4. In addition to these findings, the jury also found that "State Farm was damaged as a result of" the misrepresentations and omissions that the Silverman Petitioners made. (Questions 2, 4, 6, 10, 12, 14.)

Consistent with these jury findings, Judge Friedman separately and independently concluded that Silverman had fabricated and backdated the Fraudulent Settlements and created other documents that were "false and misleading and totally fabricated." The Sixth Circuit then summarized some of the evidence that established Silverman's personal material misrepresentations and omissions as follows:

> The jury had ample grounds for finding Silverman responsible for several knowing and material misrepresentations. The record, as an initial matter, shows that Silverman himself made several misrepresentations: The court-appointed computer expert testified that Silverman backdated several of the settlement agreements between State Farm and his clients; a doctor testified that Silverman submitted a forged prescription for attendant care and supervision for his client; a care provider for one of Silverman's clients testified that Silverman instructed her to bill as if she had provided 24 hours of care per day, even though she agreed only to provide four to eight hours of care per day; and a State Farm case manager (who replaced Swagler) testified that Silverman misrepresented the claimant's previous need for 24-hour attendant care.

Accordingly, Petitioners' argument regarding the District Court's refusal to instruct the jury on conspiracy is based entirely on the false premise that the jury found Petitioners vicariously liable for Swagler's

misrepresentations and omissions. Thus, their contention that the Sixth Circuit erred by affirming the verdicts of the judge and jury under a "concert of action" or "collusive agreement" theory is moot and simply not a basis for this Court to grant certiorari.[5]

Finally, this alleged point of error, even if established, was harmless. The Sixth Circuit went into

---

5. Even if the jury had found Petitioners liable for the misrepresentations and omissions of Swagler, their co-schemer, such a finding would have been proper. As the Sixth Circuit concluded, "[i]n view of Silverman and Swagler's collusive agreement, the jury was also permitted to hold Silverman responsible for Swagler's fraudulent statements." Under well-established Michigan law, no freestanding claim of "conspiracy" is necessary in order for a jury to apply the principle that "any defendant who knowingly participates in fraud is responsible for false representations made by others in furtherance of that scheme." *See Kefuss v. Whitley*, 189 N.W. 76, 83 (Mich. 1922) (relied upon by Sixth Circuit in affirming verdict); *Kahn v. Friedman*, 45 N.W.2d 18, 19 (Mich. 1950); *Martinoff v. Jackson News Pub. Co.*, 197 N.W. 576, 577 (Mich. 1924) (same); *McDonald v. Smith*, 102 N.W. 668, 669-70 (Mich. 1905) (same); *Gumberg v. Treusch*, 61 N.W. 872, 875 (Mich. 1895) (same). In Michigan, this doctrine is known as the "concert of action" rule, and the Sixth Circuit held it was correctly applied to State Farm's scheme allegations and evidence. Petitioners now contend that the Sixth Circuit erred because State Farm never used the exact phrases "concert of action" or "collusive agreement" to describe the Scheme. Pet. at 17-18. This argument is nonsense. A simple reading of the Sixth Circuit's opinion makes clear that it used the terms "collusive agreement" and "concert of action" synonymously with "scheme" throughout its entire discussion of this issue. While this Court does not need to reach this additional argument asserted by Petitioners for the reasons stated in this footnote, it also is not a basis to grant certiorari.

great detail as to why Petitioners' arguments of error failed. But for good measure, the Sixth Circuit also made clear that even if it were error to not give a conspiracy jury instruction, "the overwhelming evidence of a conspiracy between them, at any rate, shows that any such error would have been harmless." For all these reasons, this alleged point of error does not satisfy the requirements for reversing a court's refusal to give a jury instruction let alone the exacting standards for the grant of certiorari.

## IV. THE PETITIONERS' NUMEROUS MISSTATEMENTS OF FACT AND LAW CONSTITUTE AN ADDITIONAL REASON TO DENY CERTIORARI.

Supreme Court Rule 14(4) provides that a Petitioner's failure to present its case with "accuracy" is, standing alone, a sufficient reason to deny a petition. In furtherance of this Rule, Supreme Court Rule 15(2) provides that "the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues would properly be before the Court if certiorari were granted." The rule further provides that "[c]ounsel are admonished that they have an obligation to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Sup. Ct. R. 15(2).

Although these rules are seldom used by the Court as a basis to deny a petition, State Farm believes that it is obliged to invoke them here, and respectfully submits that Petitioners' material misstatements of facts and law, standing alone, warrant the denial of the Petition.

## A. Misstatements About Judge Friedman and The Conduct of The Trial

1. *"Petitioners did not receive a fair trial from the district judge that Respondent State Farm . . . selected for this case." Chief Judge Friedman "rewarded State Farm's confidence in him by systematically ruling in State Farm's favor on every substantive legal issue before him, facilely changing his reasoning and factual findings to suit whatever State Farm needed at the moment."*

This statement is patently incorrect and constitutes a scandalous and unsupportable accusation against a District Court judge. Supreme Court Rule 24(6) states that this Court may strike a brief that is not "free of irrelevant, immaterial, and scandalous matter."

First, State Farm did not "select" Judge Friedman. After Plaintiff Rivet filed a lawsuit against State Farm in state court, State Farm removed the case to the District Court. The district judge in this case was then *randomly* selected by the court computer. *See* E.D. Mich. LR ("Local Rule") 83.11(a)(1) ("In . . . Detroit . . . the Clerk shall employ a random method for the assignment of civil cases . . . ."). State Farm had no role whatsoever in the selection of the judge. State Farm subsequently filed counterclaims in this case against Petitioners, as was their right under Federal Rules of Civil Procedure 13, 19, and 20. In several orders, Judge Friedman held that the counterclaims were properly before him. (*See, e.g.*, 12/22/05 Order Denying Swagler's Motion to

Dismiss [Doc. 125]; 12/22/05 Order Granting in Part Courter-Defendants' Motion for Reconsideration [Doc. 126]; 3/6/06 Order Resolving Motions for Reconsideration [Doc. 155].) At no time during the pendency of this case did Petitioners challenge the right of Chief Judge Friedman to retain the counterclaims under Local Rule 83.11(a). Although they challenged his right to retain the counterclaims under Federal Rules 13, 19, and 20, as well as under other aspects of the Local Rules, as set forth above, the District Court rejected those arguments in a series of detailed opinions.[6]

Because Petitioners never appealed those rulings, they waived the argument. Accordingly, Petitioner's sole purpose in accusing State Farm of "selecting the judge," and accusing Judge Friedman of "rewarding [State Farm's] confidence in him," by "ruling in State Farm's favor on every substantive legal issue," and "facilely changing his reasoning and factual findings

---

6. Petitioners also attempted to challenge Judge Friedman's retention of the counterclaims at issue in this case in other cases pending in the Eastern District of Michigan. Specifically, on July 25, 2005, in a case that Silverman filed on behalf of one of the Insureds, *Shures v. State Farm*, No. 04-CV-72396, Silverman filed a two-part motion seeking: (1) to disqualify Judge Friedman from presiding over both this case and *Shures*; and (2) to have both this case and *Shures* reassigned to Judge Arthur Tarnow as companion cases to *Scott v. State Farm*, No. 04-CV-72255, another case that Silverman filed for an Insured ("Motion for Reassignment"). The same day, in *Scott*, Silverman filed a Motion Requesting Consent to Reassignment of both this case and *Shures* to Judge Arthur Tarnow. On July 28, 2005, notwithstanding the fact that she was not a party to *Shures*, Swagler filed a Concurrence in Mr. Shures' Motion. These motions were all denied.

to suit whatever State Farm needed at the moment" (all of which is patently false from the record), is to falsely disparage both Judge Friedman and State Farm to this Court. Such an attack has no place in the Petition and presents a basis to either strike the Petition under Supreme Court Rule 24(6), or deny the Petition under Supreme Court Rule 14(4).

> 2. *"After refusing to give Mr. Silverman the time to read the entire proposed pleading, let alone file any response to the motion, the district court granted the motion to amend. Although he could not wait until Mr. Silverman had read the proposed pleading, he had time to heap praise on State Farm's counsel."*

This is false and another attempt to smear Judge Friedman to this Court. Again, such an attack has no place in a Supreme Court Petition.

Silverman had ample time to read the proposed Counterclaims and motion for leave to amend. Indeed, the record is clear that Silverman received both the Complaint and the motion by delivery on Friday, July 2, and did not appear in Court until Monday, July 5. The Counterclaims accused Silverman of engaging in a massive fraud Scheme, naming six of his existing clients as additional counter-defendants. Nevertheless, at the hearing on State Farm's motion for leave to amend, Silverman stated that he had not "even fully been able to read the motion" and the Counterclaims attached thereto. If Silverman, in fact, had not read the allegations in the approximately 72 hours that he was

in possession of them, such a failure to do so was of his own choosing. Notwithstanding Silverman's contention, however, the record suggests that he was clearly familiar with the contents of the allegations as he repeatedly referred to them during the hearing.

Moreover, although the Court preliminarily granted State Farm leave to file the Counterclaims, Judge Friedman stated at that hearing that Silverman preserved all his defenses with respect to the Counterclaims and that he could file a motion to reconsider the Court's decision if he wanted to provide law on the subject. Judge Friedman also indicated that Silverman and the other counter-defendants retained all their rights under Federal Rule of Civil Procedure 12 with respect to the new Counterclaims.

Over the next three months, Counter-Defendants filed six motions and concurrences, seeking to have the Counterclaims dismissed or removed from Judge Friedman's docket. (*See* 7/26/05 Joint Motion for Reconsideration re Order on Leave to File by Robert Rivet [Doc. 52]; 7/26/05 Concurrence in Motion for Reconsideration re Order on Motion for Leave to File by Lori Andres, Melissa Davis, Mark Phillips, Robert Rivet, Sonja Scott, Tracey Shures, Ramona Thomas [Doc. 53]; 7/29/05 Concurrence in Motion for Reconsideration re Order on Motion for Leave to File and the motions of the plaintiff for disqualification of Judge Friedman and declare this matter a companion case to be reassigned to Judge Tarnow by Swagler [Doc. 60]; Motion for Reassignment filed in *Scott v. State Farm*, No. 04-CV-72255; 8/22/05 Joint Motion to Drop All Counter-Defendants by Robert Rivet [Doc. 73];

9/26/09 Motion to Dismiss for Lack of Subject Matter Jurisdiction [Doc. 99].) Each motion was fully briefed, carefully considered, and individually ruled upon by the Court. It is clear, therefore, that Silverman received all of the process that was due him, indeed more, and that the Petition should be stricken under Supreme Court Rule 14(4) because of the numerous misstatements of fact contained therein.

> 3. "*Judge Friedman is a friend of a founding partner of State Farm's local counsel. This particular attorney had developed animosity toward Mr. Silverman when Mr. Silverman represented a client that sued a member of a prominent political family, who was represented by this attorney.*"

Petitioners' unsubstantiated statements about the supposed animosity of an unidentified lawyer who practices at the firm of State Farm's local counsel, but who was not involved in this case, as well as the clear inference that the animosity of Judge Friedman's unidentified "friend" caused Judge Friedman to be biased against Silverman, is not supported by any evidence in the record and has no place in the petition.[7]

---

7. State Farm assumes that Petitioners are referring to Eugene Driker, a partner in the law firm retained by State Farm to serve as local counsel. Mr. Driker did not file an appearance or have any involvement in this case whatsoever. During the trial, on March 12, 2007, Mr. Driker, came to court to talk with Judge Friedman about a mutual friend who was ill. They had a private conversation outside the presence of the jury, and counsel for Petitioners subsequently complained that they did not "believe

(Cont'd)

Moreover, although Petitioners moved to disqualify Judge Friedman, also based on an alleged unspecified bias by Judge Friedman, Petitioners never appealed the denial of that motion, either on an interlocutory basis or at the end of the case. Given the anonymous nature of Petitioner's allegation, it is also scandalous, as neither Judge Friedman, the firm that served as local counsel, nor counsel on this appeal, can respond to such unspecified allegations, let alone for the first time on appeal.

### B. Misstatements Related To The Evidence Admitted Or Excluded At Trial.

#### 1. *"The evidence at trial was almost exclusively devoted to how [Swagler] did not comply with [State Farm's] policies."*

This is simply not true. The ways in which Swagler failed to comply with State Farm policies was a miniscule part of the evidence. The majority of evidence

---

(Cont'd)

it's appropriate just in the interest of avoiding an impropriety for the Court be having ex-parte conversations with any counsel during the course of the case." Petitioners further threatened that "We wouldn't want any grounds to challenge propriety of rulings when we get to the end of the case." Judge Friedman responded as follows: "If you think that creates some sort of impropriety of an attorney who does not have an appearance in the file to come to the sidebar outside the presence of the jury and we discuss some ill friend, then there's not much I can do." Moreover, Judge Friedman was clear that he did not speak with Mr. Driker in any way about this case. Accordingly, to the extent Petitioners are referring to Mr. Driker, there is simply no evidence that Mr. Driker has any animosity towards Petitioners, that Mr. Driker discussed this case with Judge Friedman, or that he caused Judge Friedman to be biased against them in any way.

extensively included documents and testimony related to:

- material misrepresentations and omissions that Silverman personally made in furtherance of the Scheme;
- material misrepresentations and omissions that Silverman's Legal PC made in furtherance of the Scheme;
- material misrepresentations and omissions that Silverman's Psychiatric PC made in furtherance of the Scheme;
- material misrepresentations and omissions Swagler made in furtherance of the Scheme (unrelated to the violation of any State Farm policy);
- Silverman's destruction, concealment, and manipulation of computer data during discovery by the court-appointed computer forensic expert;
- Silverman's destruction, concealment, and manipulation of computer data during the trial of the case;
- the nature and extent of the Silverman-Swagler relationship to explain the manner in which the Scheme originated and unfolded;
- the fact that Swagler had repeatedly and specifically been told not to take on cases that involved Silverman as insured's counsel because of her personal relationship with him;

- the extent to which Silverman and Swagler were in more than daily contact, including on nights and weekends, even though insisting that they were conducting arms-length negotiations as personal injury lawyer and claims adjuster; and

- damages suffered by State Farm as a result of the Scheme to defraud.

2. *"The district court judge refused to admit the public record [transcript] into evidence because Respondent and a non-party to this case had agreed to call the public record 'confidential.'"*

This is incorrect in several material respects. Fist, confidentiality was only one of two grounds upon which the District Court judge excluded the transcript at issue. The District Court also found that the document was irrelevant to the Scheme because it was entered three years after the Scheme was uncovered. Second, the Court did not refuse to admit the public record transcript because the parties had agreed that the *transcript* was confidential. Rather, Silverman himself conceded, and the Court agreed, that all parties to the underlying settlement agreement agreed that the *settlement* was confidential, and that the sole reason that the transcript of the settlement proceeding had not been made confidential was because an error had occurred. The Court concluded that the error in failing to file the transcript under seal was not a basis to admit the document. Third, Silverman, as the insured's attorney, agreed to the confidentiality of the Apostolopolous Settlement and thus, Petitioner's statement that

State Farm and "a non-party to this case" agreed to the confidentiality provision is also false.

Again, Petitioners' false and misleading misrepresentations to this Court require denial of their Petition for certiorari.

### C. Misstatements About The Basis Upon Which The Court of Appeals Affirmed The Fraud Verdicts.

1. *"The court of appeals affirmed the judgment based upon two new legal theories that were never raised in the district court. One of these new theories was raised by State Farm for the first time at oral argument. The second was not even raised by State Farm. Instead, the circuit court itself raised the theory in its opinion affirming the judgment."*

This is incorrect. State Farm's legal theory or claim in the District Court was that Silverman and Swagler engaged in a "a scheme to defraud." The two new alleged "legal theories" that Petitioners refer to here are "concert of action" and "collusive agreement." Under Michigan law, however, "concert of action" and "collusive agreement" are not different legal theories than a "scheme to defraud." Rather, they are simply different words to describe the same legal theory. The notion that State Farm raised "concert of action" for the first time at oral argument or that the appellate court considered "collusive agreement" and "scheme to defraud" to be different legal claims is belied by both Michigan law and the record in this case.

This Court should not reward parties whose petitions are replete with false and misleading representations by granting the rare and extraordinary relief of certiorari. Accordingly, State Farm respectfully requests that the Court deny Petitioners' request for a writ of certiorari pursuant to Supreme Court Rule 14(4).

## CONCLUSION AND RELIEF REQUESTED

For all these reasons, Respondent State Farm respectfully requests this Court to deny the writ of certiorari requested.

Respectfully submitted,

ROSS O. SILVERMAN
*Counsel of Record*
CHARLES CHEJFEC
KATTEN MUCHIN ROSENMAN LLP
525 W. Monroe Street
Chicago, IL 60661
312-902-5200

*Attorneys for Respondent*